**Ead Motors Eastern Air Devices, Inc. *and* IUE–CWA Local 81243, AFL–CIO.** Cases 1–CA–40651, 1–CA–41036, and 1–CA–41172

April 28, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On June 15, 2004, Administrative Law Judge Martin J. Linksy issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Union filed briefs in support of the judge's decision. The General Counsel and the Union also filed cross-exceptions and supporting briefs. The Respondent filed an answering brief. [1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified, and to adopt the recommended Order as modified and set forth in full below.[2]

## I. INTRODUCTION

This case primarily concerns the Respondent's declaration of impasse following collective-bargaining negotiations and its unilateral actions subsequent to that declaration. The judge found that the Respondent prematurely declared impasse; consequently, he found that the Respondent was not privileged to implement the terms of its final offer to the Union, and that many of the Respondent's subsequent unilateral actions were also unlawful. For the reasons set forth below, we agree with the judge's conclusion that the Respondent unlawfully ended negotiations before reaching a valid impasse. With minor exceptions, discussed more fully below, we also agree with the remainder of the judge's findings.

## II. ALLEGED UNFAIR LABOR PRACTICES

### *A. Impasse and Implementation*

#### 1. Factual background

The Respondent manufactures electric motors and has had a collective-bargaining relationship with the Union for close to 60 years. The parties' historical bargaining practice involved intensive negotiations over a limited number of lengthy bargaining sessions. This practice would culminate in the Respondent's presentation of a final proposal immediately prior to the contract's expiration, which the Union would then present to its membership for a ratification vote. Following this practice, the parties entered into a number of collective-bargaining agreements over the years, the most recent of which was effective, by its terms, from September 16, 1999, to September 15, 2002.[3]

For the 2002 negotiations, the parties held seven sessions, totaling approximately 73 hours, on September 5, 10, 13, 14, 15, 16, and 17. Attorney Peter Kraft served as the Respondent's chief negotiator; Union Representative Eddie Oakley served in that capacity for the Union.

At the September 5 session, the Respondent's president, Dominic More, made a speech about the state of the Company, explaining that it needed concessions and flexibility from the Union in order to survive. He said that the Company found itself in this situation because of economic reasons, e.g., work going overseas, and not because of any fault of the Union; nevertheless, he ex-

[1] There are no exceptions to the following findings of the judge: (1) the Respondent did not violate Sec. 8(a)(5) and (1) when it laid off 17 employees on September 23, 2002; (2) the Respondent did not violate Sec. 8(a)(5) and (1) when it, on October 23, 2002, eliminated the practice of allowing union officers and stewards to take time off from scheduled work to attend union business meetings; (3) the Respondent violated Sec. 8(a)(5) and (1) when it unlawfully assigned unit work to nonunit employee Cindy Chapman in January 2003; (4) the Respondent did not violate Sec. 8(a)(5) and (1) when it subcontracted unit work to an outside contractor in February and in March 2003; (5) the Respondent did not violate Sec. 8(a)(5) and (1) when it notified the Union, on January 29, 2003, that future information requests should be made in writing; (6) the Respondent violated Sec. 8(a)(5) and (1) when it failed to provide information requested by the Union on February 28, 2003; (6) the Respondent violated Sec. 8(a)(5) and (1) when it withdrew recognition from the Union on June 16, 2003; (7) the Respondent did not violate Sec. 8(a)(5) and (1) when it assigned unit work to Chapman in June 2003; and (8) the Respondent violated Sec. 8(a)(2) and (1) when it dominated and assisted the "Have Your Say" committee.

Moreover, for the reasons stated in his decision, we adopt the following findings of the judge: (1) the Respondent violated Sec. 8(a)(5) and (1) when it refused to provide information requested by the Union on September 14 and October 24, 2002; (2) the Respondent did not violate Sec. 8(a)(5) and (1) when it downgraded 12 employees on September 25, 2002; (3) the Respondent violated Sec. 8(a)(5) and (1) when it posted openings for the position of quality assistant A in the receiving department; (4) the Respondent did not violate Sec. 8(a)(5) and (1) when it recalled Linda Doane and Nancy Kane to PM Stepper Cell machine operator positions at labor grade 2 on October 24, 2002; (5) the Respondent did not violate Sec. 8(a)(5) and (1) when it did not recall Jennie Smith on December 9, 2002, to the position of maintenance assistant; (6) the Respondent violated Sec. 8(a)(5) and (1) when it, on or about February 10, 2003, placed employee Marie Hay into a trainee position and paid her a lower wage rate than she was entitled to receive; (7) the Respondent violated Sec. 8(a)(5) and (1) when it unlawfully transferred employee Melissa Thornton to a position and paid her at a lower wage rate than she was entitled to receive; and (8) the Respondent violated Sec. 8(a)(5) and (1) when it, in February 2003, placed employee Michael Jackson in the position of material handler and paid him at a lower wage rate.

[2] We have modified the recommended Order to more closely reflect the violations found, and in accordance with our decision in *Ferguson Electric Co.,* 335 NLRB 142 (2001).

[3] During the 2002 negotiations, the parties agreed to extend the agreement to September 17.

Unless indicated otherwise, all dates are in 2002.

plained that, due to the tough economic times, critical changes were needed. Oakley responded that, although it appeared that the parties' proposals would be quite a way apart, everybody understood that things needed to be done to keep the shop open.

At this first session, the parties agreed to discuss noneconomic issues before negotiating economic ones. They began by discussing the Respondent's matrix proposal, which was a wholesale reconfiguration of the extant job classification system. In its initial form, the matrix "propose[d] to change job classifications, job duties, functions, required skills and many of the particulars of the existing job classification structure," with specific language to be proposed later. It also would have limited the Union's right to grieve the creation of new positions during the contract term: "[t]he only grievable issue shall be whether the rate set by [the Respondent] is arbitrary and capricious."[4]

During the September 10, 13, and 14 bargaining sessions, the parties discussed their noneconomic proposals, placing particular emphasis on the matrix. On September 10, the Union stated that it could agree to the arbitration portion of the matrix proposal if the Respondent would remove the "arbitrary and capricious" language. On September 13, Oakley told the Respondent that the matrix "was the hardest thing to sell because people in the shop did not want their job descriptions to go away." On September 14, Oakley told the Respondent that the Union was not in total disagreement with the concept of the Matrix, and that it was still open for discussion.

At the close of the September 14 session, the Respondent presented and explained its economic proposals. Significantly, the Respondent sought a 3-year wage freeze, the substitution of a 401(k) plan for the existing pension plan, and a new employee health insurance plan. The Respondent's proposals also covered holidays, vacations, overtime, seniority, jury duty, and vending machine earnings.

The parties next met on September 15, the date the contract was to expire. The Union opened the session by presenting its economic proposals. Among other things, the Union sought a 6-percent annual wage increase, a 5-cent annual increase in company contributions to the existing pension fund, increased insurance benefits, and additional holidays and vacation. The Union then rejected the Respondent's economic proposals, with Oakley explaining that the Union was trying to be flexible, but that the matrix, which was a tough sell alone, was made more difficult coupled with the Respondent's economic proposals. He told the Respondent's negotiating committee that if it was close to its final offer there was no way the Union could ratify it.

Kraft reiterated the Respondent's explanation for the changes it sought. He told the union committee that the Respondent was not seeking a 3-year wage freeze,[5] and asked the Union to be optimistic and understand that the Company's proposals had many advantages. The parties next went over noneconomic issues, with each side responding to the other's proposals. After those responses, Kraft stated that the parties were at a standstill on wages and that the Company's wage proposal would not change. Thereafter, the conversation returned to noneconomics, including the matrix. The Respondent presented its first revision to the matrix proposal.[6] After reviewing this proposal, the parties continued to discuss the matrix and other noneconomic issues.

In the late afternoon of September 15, Kraft asked Oakley whether "it [made] sense that [they] extended the contract and [got] a federal mediator in." Oakley replied that they should seek a mediator's assistance because there was so much left on the table that they would never get through it. Kraft stated that it was just an idea, and that he had to "check and see if [he could] do that." Once he received authority, the parties extended the contract until 7 p.m. on September 17.[7]

On September 16, a mediator was brought in to assist the negotiations. The parties again occupied themselves with the matrix and other noneconomic issues. A union negotiator stated that the matrix was not a perfect sys-

[4] Coupled with the proposal was "Exhibit A," which provided job functions (i.e., required skills for different job names), progression requirements (i.e., which skills were needed, and at what level of proficiency, to progress through the different pay grades within each job name), and skill matrixes (i.e., tables used to indicate employee proficiency at their job functions) for five different job names. Each skill matrix identified by name the employees who would be assigned to the new classification and specified the employee's starting pay grade.

[5] Despite this assurance, the Respondent did not revise its wage proposal until its final offer, in which it proposed an approximately 18-month wage freeze.

[6] The revised proposal provided (1) that all employees would initially be assigned the labor grade set forth in the proposed "Appendix A," (2) that progression evaluations would take place semiannually, (3) that determination of proficiency levels would be made by a review team, the composition of which was also contained in the revised proposal, and (4) that employees who requested training on a particular skill would be placed in "trainee" status "on a seniority basis."

[7] It is disputed what Kraft said after receiving authority to extend the contract. Oakley testified that Kraft said "that his authority would end —his authority to negotiate would end on September 17th at 7:00 p.m." The Union's bargaining notes include Kraft's remark as, "[M]y authority limited to to [sic] end contract at [7 p.m.] Tues. night." Kraft denied having made the statement attributed to him by Oakley, and testified that he said, "I have the authority to extend the contract to seven o'clock Tuesday [9/17] night." The judge did not make a finding regarding this disputed fact. We find that the weight of the evidence, including the union bargaining notes, supports Kraft's testimony.

tem; he asked if it would be open for future discussion if the Union would tentatively agree to the proposal. The Respondent said yes and acknowledged that the proposal required modifications. Oakley suggested quarterly meetings between the parties to continue developing the matrix.

On September 17, the parties continued to discuss the matrix. In the morning, they discussed the timeline for completion of the matrix, and a union proposal for a "transition agreement." After some discussion, the parties drafted a tentative transition agreement that called for regular meetings to "discuss the strengths and weaknesses of the new job classification/job title structure." The transition agreement also provided that, "[t]o the extent a job title is not currently included in a progression matrix, the employees shall retain their current job title until the Skill Matrix for their position is completed."[8]

After discussing the transition agreement, the parties revisited other noneconomic proposals, and both sides made several quid pro quo type proposals in an attempt to reach agreement. While the Respondent was going through its noneconomic proposals, Oakley interrupted to express concern that they were not "going to make it," i.e., reach agreement before the end of the day. He said that the Respondent had not yet responded to the Union's initial economic proposals, which were already "cut . . . to the bone." Oakley then made a package proposal on noneconomic issues, stating that the Union would accept the matrix proposal subject to further negotiation as provided for in the transition agreement if the Respondent would withdraw certain other noneconomic proposals. The parties then discussed several different options for the matrix that had not been discussed before, like trying the matrix as a pilot program with a reopener after 6 months. The Union reiterated its package proposal.

After a caucus, the Respondent rejected the package proposal, saying that it was not constructive to do package deals and that they needed to shift to economic issues. The Respondent presented its insurance proposal, then stated that it refused all of the Union's economic proposals. At 3:45 p.m., the Respondent presented a new economic proposal, which showed some movement from its initial positions on insurance benefits and overtime. Kraft told the Union that it should look at the proposals and let the Respondent know "how much [the Union] can shave off [its] economic proposals." Immediately after doing so, Kraft gave the Union until 5 or 6 p.m to respond and stated that the Respondent was going to work on its final proposal. At 5:50 p.m., Kraft presented the Respondent's final economic proposal, which, among other changes, reduced the sought-after 3-year wage freeze to approximately 18 months. Immediately thereafter, the Respondent presented its final noneconomic proposal, which included a revised matrix proposal that specifically incorporated the terms of the transition agreement. After reviewing the final proposals, the Union told the Respondent's committee that it could not recommend ratification.[9]

Nevertheless, the Union held a ratification meeting immediately after the September 17 session ended. Oakley informed the membership that the Union had a final offer from the Respondent, which had decided to end bargaining at 7 p.m., but that the committee was not recommending it. Oakley told employees that the committee wanted to go back and negotiate more.[10]

The membership rejected the final proposal by a 68-to-7 margin. Union President Mike Jackson called Company President More and informed him of the vote to reject the contract. More asked whether the employees were going to strike, and Jackson told him that they had not yet decided how to proceed. The employees decided not to strike, choosing instead to return to work and continue bargaining.

On September 19, Kraft sent a letter to the Union informing it that "the parties are at a bargaining impasse." He continued, "[i]n all of my bargaining experiences and history with EADmotors/IUW–CWA Local 81243, the parties have treated the end of the contract term as the clear conclusion of the bargaining process. Our recent negotiations is [sic] no different. The Company did not tender its final offer with the notion that further bargaining would be fruitful or otherwise yield meaningful compromises or concessions in the immediate wake of a membership vote opposed to ratification." He concluded by stating that the Respondent intended to implement some features of its final proposal in the "near term."

On September 25, the Union denied that the parties were at impasse, and stated that "rejection by the membership of your proposal does not terminate bargaining

[8] The matrix as implemented had nine different skill matrixes, i.e., four more than were prepared for discussion during negotiations.

[9] At this point in the negotiations, the parties had successfully concluded agreement on several of their initial proposals. For example, they either had reached tentative agreement on or had withdrawn proposals concerning the creation of a development cell, union security, no strike/no lockout, and vending machine earnings, and certain of the various proposals covering vacations, seniority, management responsibilities, grievance and arbitration procedures, and temporary employees.

[10] Employee Dave Horne testified that on September 17, during a discussion after the bargaining session ended, Oakley said that the parties were at "impasse." Oakley conceded that he may have made this statement.

practically or legally." It also requested continued bargaining. On October 22, the Respondent issued a "Booklet" implementing much of its final proposal. The "Booklet" included some terms and conditions that were never discussed during negotiations, such as the Development Cell description and job-bumping rights. In November, the Respondent issued a "User's Manual" implementing the matrix. As the judge recognized in his decision, the "User's Manual" differed from the Respondent's final proposal in that it covered four new job classifications that had not been presented to the Union during negotiations.

2. Analysis

The judge found that the Respondent violated Section 8(a)(5) and (1) "when it prematurely declared impasse and began implementing its last best offer to the Union." The judge based this finding on his understanding that the Respondent's matrix proposal–the primary concern throughout negotiations–was incomplete, "a work in progress." Because the Union was not presented with a complete proposal on the matrix, the judge found that the Respondent could not lawfully declare impasse. While we agree with the judge that the Respondent violated Section 8(a)(5) and (1) when it prematurely declared impasse and implemented new terms and conditions of employment, we do not agree with his rationale.[11] Instead, we rely on the following analysis.

In *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), enfd. sub. nom. *Television Artists, AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968), the Board defined an impasse as a situation where "good-faith negotiations have exhausted the prospects of concluding an agreement." See also *Newcor Bay City Division*, 345 NLRB 1229, 1238 (2005). This principle was restated by the Board in *Hi-Way Billboards*, *Inc.,* 206 NLRB 22, 23 (1973), enf. denied on other grounds 500 F.2d 181 (5th Cir. 1974), as follows:

> A genuine impasse in negotiations is synonymous with a deadlock: the parties have discussed a subject or subjects in good faith, and, despite their best efforts to achieve agreement with respect to such, neither party is willing to move from its respective position. [Footnote omitted.]

The burden of demonstrating the existence of impasse rests on the party claiming impasse. *Serramonte Oldsmobile*, *Inc.,* 318 NLRB 80, 97 (1995), enfd. in pert. part 86 F.3d 227 (D.C. Cir. 1996). The question of whether a valid impasse exists is a "matter of judgment" and among the relevant factors are "[t]he bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, [and] the contemporaneous understanding of the parties as to the state of negotiations." *Taft Broadcasting Co.*, supra at 478.

We find that the Respondent has not met its burden to establish a valid impasse. The Respondent did not inform the Union, or argue to the Board, that impasse was reached over any specific issue. Rather, it appears that the Respondent determined that the parties were at impasse on the whole of its final proposal, an impasse purportedly created when the Union failed to ratify that proposal. This position appears to be based, at least in part, on the Respondent's understanding that, under the parties' bargaining history, it was entitled to conclude negotiations when the contract expired. We disagree.

*a. The parties' bargaining history does not establish that the parties were at impasse on September 17, 2002*

The record supports the Respondent's assertion that the parties had always treated the expiration of the contract as the point at which the Union took a ratification vote on the Respondent's proposed terms. However, the fact that there is a ratification vote does not itself show that the parties are at impasse. More particularly, if the vote is to approve the proposal, there is a contract. If the vote is to reject it, there must be more bargaining. A separate issue is whether more bargaining would be futile because the parties are at impasse. But that issue turns on the factors noted above, not on the mere fact of a negative ratification vote. The Respondent provided no evidence, beyond the self-serving terms of its letter declaring impasse, that bargaining would have been futile

[11] The judge relied on *I.T.T. Rayonier, Inc.,* 305 NLRB 445 (1991), in determining that the Respondent's matrix proposal was incomplete. In our opinion, *I.T.T. Rayonier* does not support the judge's finding. In that case, the Board recognized that "there is nothing improper in an employer's commencing negotiations with a broad outline of proposals that are nonspecific and attempting to obtain through negotiations the Union's cooperation in developing contract language to resolve a specific concern." Id. at 446 fn. 6. It went on to explain that it is only when the union is unwilling to participate in that form of negotiation that the company must, "to fulfill its bargaining obligations, put 'meat on the bone.'" Id. Here, the Respondent's matrix proposal began in conceptual form. Through the course of negotiations, most of the specifics of how the matrix would operate and affect unit employees were discussed and developed by both parties and integrated into the Respondent's revised proposals. Additionally, the transition agreement, which was expressly incorporated by reference into the Respondent's final offer, provided for creation of job matrixes from the missing job classifications and continuing discussion about the matrix itself. Indeed, the Union made a package proposal that would have included the matrix proposal in the same form that the judge found lacking. Under these circumstances, the matrix proposal cannot be characterized as not fully formulated such that the parties could not effectively bargain over it.

after September 17, the day that the contract expired. See, e.g., *Newcor Bay City Division*, supra, slip op. at 11–12 (rejecting argument that contract expiration date ended bargaining obligation where company provided no evidence that, when it set that deadline, it had a basis for believing that bargaining would become futile after that time). Rather, the evidence showed only that prior negotiations had ended in a positive ratification vote, sometimes against the union committee's recommendation. There was no evidence that in prior bargaining the parties had attempted, much less been unable, to reach agreement after a failure to ratify the Respondent's final offer.

*b. The arbitrary deadline did not allow sufficient time for meaningful bargaining over the Respondent's proposed changes*

The scope and breadth of the changes sought by the Respondent in these negotiations far exceeded those of negotiations past, and illuminated the impractical nature of the Respondent's deadline. Discussion of the matrix occupied a significant portion of the negotiations through September 15, the original contract expiration date. At that point, the parties had presented their respective economic proposals, but had only discussed them in general terms. Once the parties extended the contract, they did not turn their attention to economic issues, but, instead, continued their ongoing discussions of the matrix and other noneconomic proposals. By the end of the September 17 session, the parties' discussion of economic issues had been little more than an exchange, and rejection, of proposals, and general talk regarding the interplay between economics and the matrix. Thus, the artificially truncated negotiation period was insufficient to allow meaningful discussion of the issues presented in these negotiations. See *Newcor Bay City Division*, supra, slip op. at 11 (citing *U.S. Testing Co.*, 324 NLRB 854, 860–861 (1997), enfd. 160 F.3d 14 (D.C. Cir. 1998)).

*c. The Respondent has not established that the parties were deadlocked at the end of bargaining*

The amount of movement on the Matrix that occurred on September 17 also supports a finding of no impasse. For the first time, the parties discussed a possible side agreement, the transition agreement, which could resolve several of the Union's continuing concerns about the matrix proposal. Also, the parties discussed, and the Union expressed interest in, the possibility of trying the matrix as a pilot program. The record thus shows that the Union demonstrated flexibility and a willingness to accept the matrix in some form. Indeed, the record demonstrates that both parties were making efforts to narrow the distance between their positions throughout the September 17 bargaining session.

This movement by the Union on September 17 also presented an opportunity for meaningful negotiation on economic issues. When the Respondent presented its modified economic proposals, Kraft asked the Union to consider them and see "how much [the Union] [could] shave off [its] economic proposals." Immediately after requesting this movement, however, the Respondent stated its intention to prepare its final proposal, which it presented before the Union had an opportunity to respond to the earlier proposal. In these circumstances, the Respondent has not shown that the parties were deadlocked on economics.[12]

The presence of the transition agreement in the Respondent's final offer is further evidence of no impasse. The transition agreement called for further negotiations about the matrix, and specifically contemplated further changes to the job classification structure proposed by the Respondent during negotiations. By incorporating the transition agreement into its final offer, the Respondent effectively conceded that further fruitful negotiations over job classifications were not only possible, but necessary.

*d. The Union did not consider the parties to be at impasse*

Finally, in response to the Respondent's declaration of impasse, the Union stated its intention to return to the bargaining table pursuant to the decision of its membership to continue bargaining rather than strike. Although not determinative, these statements further support a finding of no impasse. *Newcor Bay City Division,* supra, slip op. at 11 (citing *D.C. Liquor Wholesalers v. NLRB*, 924 F.2d 1078, 1084 (D.C. Cir. 1991)). This is true even though the Union had not yet offered specific additional concessions, but only declared its intention to continue bargaining.[13] Id. (citing *Grinnell Fire Protection Systems Co.*, 328 NLRB 585, 585–586 (1999), enfd. 236 F.3d 187 (4th Cir. 2000), cert. denied 534 U.S. 818 (2001)).[14]

Based on the foregoing, we find that the Respondent has failed to meet its burden of establishing the existence

[12] The fact that the Union never moved from its initial economic proposal does not support a finding of impasse because the Respondent's negotiating schedule did not give the Union a chance to present a new proposal.

[13] Chairman Battista does not agree that a mere intention to continue bargaining, without specific proposals, precludes a finding of impasse.

[14] Oakley's comment to Horne that the parties were at "impasse" does not alter this analysis. Because the Union subsequently voted to return to the bargaining table and the Respondent only declared impasse 2 days later, it is unclear whether the comment demonstrates a "contemporaneous understanding" that the parties were, in fact, at impasse. Even if it did, it is insufficient in light of other *Taft Broadcasting* factors favoring a finding of no impasse.

of a valid impasse. Accordingly, the Respondent violated Section 8(a)(5) and (1) when it unilaterally implemented new terms and conditions of employment. See *NLRB v. Katz*, 369 U.S. 736 (1962).

*B. Unilateral Changes*

1. Toolroom attendant

Prior to September 2002, Cindy French served as the toolroom attendant in a full-time capacity. Although not mentioned by the judge, the record shows that on or around September 25 a meeting was convened during which Union Steward Leo Grondin and Management Representative Jeff Smith discussed, among other things, the impact on French of layoffs implemented earlier that month. They agreed that, for "probably [half of her] time," French would be "helping out in [the] stock room." The other half of her time would be spent attending the toolroom. French was then notified of this change.

Subsequently, French went on a leave of absence. During her absence, employees started drawing their own tools from the toolroom. When she returned, she was reassigned to the stockroom, where she remained a full-time employee. Her position as toolroom attendant was therefore eliminated. The Respondent's human resources manager, Brenda Leamy, testified that this change was made pursuant to implementation of the Respondent's Matrix proposal.

The General Counsel has alleged that the Respondent violated Section 8(a)(5) and (1) by reducing the toolroom attendant position from full time to part time, and by eliminating the position altogether. The judge found no violation. We agree.

Regarding the reduction from full time to part time, the record shows that the Respondent conferred with union leadership prior to altering French's schedule. Moreover, it shows that the Union agreed to this change. The record contains no other evidence to support a finding that this was a unilateral change. Thus, the Respondent did not violate Section 8(a)(5) when it "reduced" the toolroom attendant position on September 25.

Regarding the elimination of the position and French's transfer to the stockroom, the record shows that this change was made pursuant to the Respondent's implementation of its matrix proposal. As we have found above, the Respondent's matrix implementation was unlawful. However, the Board has made clear that in order to constitute a unilateral change that violates the Act, an employer's action must effect a material, substantial, and significant change in terms or conditions of employment. *Millard Processing Services*, 310 NLRB 421, 425 (1993); see also *Peerless Food Products*, 236 NLRB 161 (1978). The record does not demonstrate that French's transfer from the toolroom to the stockroom, and the attendant elimination of the toolroom position, amounts to such a change. The elimination of the toolroom position did not affect French's pay or her schedule. As to her duties, prior to the Respondent's elimination of the toolroom position, French's work involved working some of her time in the toolroom and some of her time in the stockroom. Because of the change, French merely began doing full time what she had been doing part time. There is no evidence concerning the duties of either position. Based on all of the above, we find that it has not been established that the elimination of the toolroom position altered French's job duties in any material, substantial, and significant way.[15] As such, we find that the unilateral change to French's terms and conditions of employment was de minimis, and that the Respondent did not violate Section 8(a)(5) and (1) in this respect. See *Peerless Food Products*, supra at 161.[16]

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[15] Citing *Flambeau Airmold Corp.*, 334 NLRB 165, 172 (2001), our dissenting colleague asserts that the elimination of the toolroom attendant position changed "the job assignment[] of the affected employee[] and, therefore, violate[s] the Act." The dissent argues that French's work environment changed, and that she also lost "whatever variety she derived from working the two positions." There is, however, no record evidence concerning the toolroom and stockroom work environments. Nor is there any basis for finding a loss of variety in work assignments where, as here, the record fails to establish the duties of either position.

Member Schaumber finds that *Flambeau Airmold* is further distinguishable and does not support finding a violation here. In *Flambeau Airmold*, the positions of several employees were eliminated with other employees required to "pick up" their responsibilities. Notably, the Board affirmed the judge's finding of no violation with respect to the employees who "pick[ed] up" these job responsibilities because there was no "evidence establishing that this was a material change." Here, as discussed above, the record evidence is insufficient to justify a finding that the elimination of the toolroom attendant position changed French's terms and conditions of employment in any material, substantial, or significant way.

[16] Member Walsh agrees with the majority that the Respondent did not violate the Act when it reduced the toolroom position from full time to part time. However, he would find that the Respondent violated Sec. 8(a)(5) when it eliminated the position altogether and transferred French to the stockroom. There is no dispute that the implementation of the matrix was unlawful and that the elimination of the toolroom position was made pursuant to the implementation of the matrix. As such, the elimination of the position also violated Sec. 8(a)(5). Further, it is well established that a statutory bargaining obligation arises with respect to a unilaterally implemented change when that change is a "'material, substantial, and a significant' one affecting the terms and conditions of employment of bargaining unit employees." *Golden Stevedoring Co.*, 335 NLRB 410, 415 (2001), quoting *Millard Processing Services*, supra at 425 (1993) (citation omitted). Here, as the majority points out, French had been doing both stockroom and toolroom work. When the Respondent eliminated the toolroom position, French spent all of her time in the stockroom. Even without evidence as to the duties of either position, the elimination of the toolroom position resulted in changes in French's work environment and where she spent some of her worktime. She also lost whatever variety she derived from

2. PM stepper cell positions

On May 16, 2003, the Respondent posted an opening for a cell operator class "C" in the PM stepper department. The expired contract did not distinguish between "classes" at this position, and classified it as a labor grade 4, which determined its wage rate. Pursuant to the matrix, the position was posted at labor grade 3, which carried a lower wage.

The General Counsel alleged that the Respondent violated Section 8(a)(5) and (1) by posting this job pursuant to the matrix at a lower pay grade than the position traditionally received. The judge found that there was no violation. We disagree.

The Respondent unequivocally admitted that the change in labor grade from 4 to 3 was made pursuant to the matrix. As we have found above, the Respondent's implementation of its matrix proposal was unlawful. Further, this change would effectively preclude any employee placed in the position from earning the higher wage traditionally assigned to the position. A decrease in unit employees' wage rates is a material, substantial, and significant change. See *Millard Processing Services*, supra at 425.[17] Therefore, this change, too, was made in violation of Section 8(a)(5) and (1) of the Act.

3. Focused product line positions

The General Counsel also alleged that the Respondent unilaterally changed positions on the focused product line from labor grade 4 to 3, posted for the positions at the lower labor grade, transferred two employees to the positions, and paid them at the lower pay grade. The judge found no violation because the changes were made to allow more employees to qualify for the focused product line positions and then to advance within that division. The General Counsel argues that the changes were made pursuant to matrix implementation and thus violated Section 8(a)(5) and (1).

For the reasons set forth above in our discussion of the PM stepper cell positions, we find that the Respondent violated Section 8(a)(5) and (1) as alleged.[18]

AMENDED REMEDY

Having found that the Respondent violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, and, on request of the Union, to immediately put into effect all terms and conditions of employment provided by the contract that expired at 7 p.m. on September 17, 2002, and to maintain those terms in effect until the parties have bargained to agreement or a valid impasse, or the Union has agreed to changes. We shall order the Respondent to make whole the unit employees and former unit employees for any loss of wages or other benefits they suffered as a result of the Respondent's implementation of new terms and conditions of employment, as set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). We shall order the Respondent to reimburse unit employees for any expenses resulting from the Respondent's unlawful changes to their health and dental benefits, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), affd. 661 F.2d 940 (9th Cir. 1981), with interest as set forth in *New Horizons for the Retarded*, supra.

ORDER

The National Labor Relations Board orders that the Respondent, EAD Eastern Air Devices, Inc., Dover, New Hampshire, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Making unilateral changes in wages, hours, and other terms and conditions of employment of its bargaining unit employees without first bargaining with the Union to impasse.

(b) Failing and refusing to provide to the Union the Respondent's final contract offer in writing, a summary plan description of its 401(k) plan, a copy of its health insurance plan, or other information that is necessary to the Union's performance of its duties as collective-bargaining representative of the Respondent's employees.

(c) Unlawfully withdrawing recognition from the Union.

working the two positions. Thus, even though her salary and schedule did not change, the transfer to the stockroom had a material, substantial, and significant impact on her working conditions. Accordingly, "elimination of the position . . . clearly constituted a unilateral change in the job assignment[ ] of the affected employee[] and, therefore, violated the Act." *Flambeau Airmold Corp*., supra at 172.

[17] The Respondent argues that the change allowed employees who would not have been qualified for the position at a labor grade 4 to qualify for the position as trainees, with the opportunity to advance to labor grade 4 once they were capable of performing the requirements of the position. This contention does not alter our analysis. The posting for the position at a lower wage rate eliminated the possibility that any employee, however qualified, would receive the wage that historically accompanied the position when initially placed into it. As such, it was an unlawful unilateral change.

The Respondent also asserts that no employee was disadvantaged by the job posting, as there is no evidence that the employee who filled the position would have qualified for it had it been posted at labor grade 4. While this contention does not detract from our finding of an 8(a)(5) violation, it may affect the remedy. Therefore, we leave to compliance consideration of the Respondent's claim that no employee suffered any losses as a result of this change.

[18] We again leave to compliance consideration of the Respondent's claim that no employee suffered any losses as a result of this change.

(d) Unlawfully assisting, dominating, and interfering with the "Have Your Say" committee or any other labor organization.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain in good faith with the Union as the exclusive collective-bargaining representative of its employees in the following unit:

> All factory production, toolroom, maintenance and working line supervisor employees employed by the Respondent at its Dover, New Hampshire facility, but excluding executives, office and clerical employees, subsupervisors, superintendents, supervisors, general supervisors, engineers, employees of the engineering department, employees of the production control department, guards, watchmen, department supervisors, and all other supervisors as defined in the Act.

(b) On request of the Union, rescind the Respondent's unlawful unilateral changes since September 17, 2002, and restore, honor, and continue the terms and conditions of the contract with the Union that was set to expire on September 17, 2002, until the parties sign a new agreement or good-faith bargaining leads to a valid impasse.

(c) Make whole employees and former employees for any and all loss of wages and other benefits incurred as a result of the Respondent's unlawful alteration or discontinuance of contractual benefits, with interest, as provided for in the amended remedy section of this decision.

(d) Furnish to the Union in a timely manner the information requested by the Union on September 19 and October 24, 2002, and February 28, 2003.

(e) Immediately disestablish and cease giving assistance or any other support to the "Have Your Say" committee or its successors at its Dover, New Hampshire facility or bargaining with it or its successors concerning mandatory subjects of bargaining.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facility in Dover, New Hampshire, copies of the attached notice marked "Appendix."[19] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 17, 2002.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT make unilateral changes in wages, hours, and other terms and conditions of employment of our bargaining unit employees without first bargaining with the Union to impasse.

WE WILL NOT unlawfully fail and refuse to provide to the Union our final contract offer in writing, a summary

[19] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

plan description of our 401(k) plan, a copy of our health insurance plan, or other information that is necessary to the Union's performance of its duties as collective-bargaining representative of our employees.

WE WILL NOT unlawfully withdraw recognition from the Union.

WE WILL NOT unlawfully assist, dominate, and interfere with the "Have Your Say" committee or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and, on request, bargain in good faith with the Union as the exclusive collective-bargaining representative of our employees in the following unit:

> All factory production, toolroom, maintenance and working line supervisor employees employed by us at our Dover, New Hampshire facility, but excluding executives, office and clerical employees, subsupervisors, superintendents, supervisors, general supervisors, engineers, employees of the engineering department, employees of the production control department, guards, watchmen, department supervisors, and all other supervisors as defined in the Act.

WE WILL, on request of the Union, rescind our unlawful unilateral changes since September 17, 2002, and restore, honor, and continue the terms and conditions of the contract with the Union that was set to expire on September 17, 2002, until we sign a new agreement or good-faith bargaining leads to a valid impasse.

WE WILL make whole employees and former employees for any and all loss of wages and other benefits incurred as a result of our unlawful alteration or discontinuance of contractual benefits, with interest.

WE WILL furnish to the Union in a timely manner the information requested by the Union on September 19 and October 24, 2002, and February 28, 2003.

WE WILL immediately disestablish and cease giving assistance or any other support to the "Have Your Say" committee or its successors at our Dover, New Hampshire facility or bargaining with it or its successors concerning mandatory subjects of bargaining.

EAD MOTORS EASTERN AIR DEVICES, INC.

*Avrom J. Herbster, Esq*., for the General Counsel.
*Adam S. Taylor, Esq. (Kraft, Taylor, & McCormack),* of Portland, Maine, for the Respondent.
*Stephen M. Koslow, Esq.,* of Washington, D.C., for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

MARTIN J. LINSKY, Administrative Law Judge. IUE–CWA Local 81243, AFL–CIO (the Union) filed charges against EAD Motors Eastern Air Devices, Inc. (Respondent).

The charge and amended charge in Case 1–CA–40651 were filed on February 3 and August 20, 2003, respectively. The charge in Case 1–CA–41036 was filed on June 18, and the charge in Case 1–CA–41172 was filed on August 19, 2003.

On November 28, 2003, the National Labor Relations Board, by the Acting Regional Director for Region 1, issued an amended consolidated complaint (complaint), which alleges that Respondent violated Section 8(a)(1), (2), and (5) of the Act.

The 12-page complaint alleges a number of violations of the Act, which are more fully set forth below.

The most significant of the allegations are: (1) that Respondent unlawfully declared impasse in September 2002 during contract renewal negotiations and thereafter unlawfully and unilaterally implemented many changes to its employees' terms and conditions of employment, (2) that Respondent in June 2003 unlawfully withdrew recognition from the Union, and (3) that Respondent in August 2003 created, assisted, and dominated the "Have Your Say Committee," a labor organization established to fill the void left by Respondent's unlawful withdrawal of recognition from the Union.

Respondent filed an answer to the complaint in which it denied that it violated the Act in any way.

A hearing was held before me in Boston, Massachusetts, and Dover, New Hampshire, on 12 days between January 26 and March 10, 2004.

This case is also the subject of a 10(j) injunction proceeding before the Honorable Steven J. McAuliffe of the United States District Court for the District of New Hampshire.

On the entire record in this case, to include posthearing briefs submitted by counsel for the General Counsel, Respondent, and the Charging Party, and on my observation of the witnesses and their demeanor, I make the following

### FINDINGS OF FACT

#### I. JURISDICTION

At all material times Respondent, a corporation with an office and place of business in Dover, New Hampshire, has been engaged in the manufacture, sale, and distribution of electric motors.

Respondent admits, and I find, that at all material times Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

#### II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

## III. THE ALLEGED UNFAIR LABOR PRACTICES

### *A. Background*

A collective-bargaining relationship between Respondent and the Union had existed for close to 60 years.

The Union was Local 243 of the International Union of Electrical Workers (IUE), which merged a few years ago with the Communication Workers of America (CWA) to become IUE–CWA Local 81243. The 81 prefix identifies it as an IUE Local. This Local was one of the oldest locals in the IUE.

The parties had successfully agreed to a number of collective-bargaining agreements over the years. The most recent collective-bargaining agreement ran from September 16, 1999, through September 15, 2002, which by mutual consent of the parties during negotiations was extended to 7 p.m. on September 17, 2002.

### *B. Impasse*

The parties began negotiations for a successor collective-bargaining agreement on September 5 and held seven negotiating sessions, i.e., September 5, 10, 13, 14, 15, 16, and 17, 2002. They negotiated for approximately 73 hours over those seven sessions according to Ed Oakley, a union representative and chief union negotiator. Ed Oakley was the chief union negotiator and he was assisted by a committee of four union officers who were also full-time employees of Respondent. Oakley is a full-time employee of the Union.

The chief negotiator for Respondent was private Attorney Peter Kraft and he was assisted by several other people from Respondent's management ranks.

The parties began negotiations with both sides understanding that Respondent's business was in trouble financially. Evidence at the hearing before me showed sales dropped between 2000 and 2002 from $22 to $14 million. Foreign competition was a major problem. Respondent makes customized motors. The owner of Respondent is Logan Delaney who did not testify. Delaney also owns another company that manufactures and sells motors in Arkansas.

Fortunately, Respondent's business seems to be doing better financially according to the testimony of Respondent's director of human resources, Brenda Leamy, who so testified late in the hearing before me.

In any event Respondent's then president, Dominic More, opened the negotiations on September 5, 2002, with remarks about the financial problems facing Respondent and that some major changes were required.

One of the major changes required by Respondent was that the employees would be covered by Respondent's 401(k) plan and no longer would Respondent make contributions on behalf of unit employees to the union pension fund. Most significantly, however, Respondent wanted to do a massive restructuring of job classifications. Respondent's rationale for wanting this massive restructuring were triggered by Respondent wanting greater flexibility in its work force, i.e., employees being able to perform several different jobs and this would help Respondent in producing product by giving it more flexibility in where to assign employees to work. This massive restructuring proposal of changing and combining the 41 jobs listed in the collective-bargaining agreement into what turned out to be 9 jobs was referred to in this litigation as the matrix.

Bargaining over job classifications and duties are mandatory subjects of bargaining and the parties can bargain to impasse over these issues and if lawful impasse is reached the employer can implement its last best offer.

In this case, Respondent ended negotiations on September 17, 2002, when this single most important proposal contained in its final contract offer to the Union—a proposal to scrap all existing job descriptions and pay rates and replace them with an entirely new job classifications system and new pay rates—was still largely unformulated. As outlined by Respondent during negotiations, the new job classifications system would combine the job functions of the 41 existing unit positions into a number of new job classifications. Each of these new job classifications would have its own list of job responsibilities, a "Skill Matrix" listing skills required to qualify for positions within that job classification, and a "Progression Matrix" specifying the skills and degree of proficiency required to progress to higher-paying positions within that classification.

The parties deliberated long and hard on a number of issues to include Respondent's job classification restructuring proposal, i.e., the matrix, but could not reach agreement on many subjects.

On September 17, 2002, the last day of negotiations the Union proposed adopting a transition agreement on the matrix if Respondent would back off its proposals on a number of subjects to include calculation of union dues, required employee cooperation in alleged unlawful harassment investigations, change in vacation policy, maintenance by Respondent of inactive disciplinary records of employees, modification of the contract rights of union officers to perform union business, use of temporary employees, etc.

Respondent rejected the Union's compromise package deal. As a result there was no agreement on the transition agreement.

The proposed transition agreement provided as follows:

*Transition Agreement On Job Classification*

- During the first year of the contract, the Company and the Union shall meet quarterly to discuss the strengths and weaknesses of the new job classification/job title structure, and shall work together to incorporate prudent and necessary changes to said structure. During the first quarter, similar meetings will be held monthly.
- The company shall hold informational meetings with employees to explain how the new job classification structure will work.
- Once an expert or proficient skill level is attained, the employee shall retain such determination. Once a job title has been achieved, the employee shall retain the rate of the job title so long as the employee stays with the progression grouping that the title belongs to.
- To the extent a job title is not currently included in a progression matrix, the employee shall retain

their current job title until the Skill Matrix for their position is completed.

For the Company: _____ For the Union: _____

Had Respondent accepted the Union's package proposal, i.e., that on the matrix the parties would comply with the transition agreement if Respondent backed off on a number of its other proposals then the parties could have had an agreement. However, Respondent rejected the Union's package proposal.

It is likely that the parties may never have reached agreement on some subjects but they had not reached impasse on the matrix because there was no complete matrix proposal on the table when negotiations ended on September 17, 2002.

The parties could agree to work out the details on the matrix in the future but Respondent could not declare a lawful impasse when Respondent had never submitted a complete matrix proposal to the Union prior to declaring impasse.

Prior to, during, and immediately after the September 2002 negotiations for a renewal collective-bargaining agreement the current contract had nine labor grades, i.e., pay grades numbered 2 to 9 with 9 the highest paid and 2 the lowest paid, and a listing 41 jobs. The collective-bargaining agreement provided as follows:

> Following is a list of all jobs and their appropriate Classifications and respective Labor Grades.
>
> *Class 2—Production Workers—Labor Grade 2*
>
> Impregnate/Assemble
> Janitor/Maintenance Assistant
> Machine Operator "C"
> Assembler
> Winder/Assembler
> Packer
>
> *Class 3—Other Occupations, Various Skills—Labor Grade 3*
>
> Shipping/Stock Clerk
> Hand Inserter
> Line Repair Operator
> Welder "B"
> Paint Sprayer
> Receiving/Acceptance Inspector
>
> *Class 4—Other Occupations, Various Skills—Labor Grade 4*
>
> Machine Set-Up and Operate
> Lead Stock Clerk
> Special Line Repair Operator
> Process Inspector
> Short Run Stator
> Assembler
> FPL Set-Up/Operator "C"
> Junior Maintenance Mechanic
>
> *Class 5—Other Occupations, Various Skills—Labor Grade 5*
>
> Tool Crib and Gage Attendant and Repairperson
> Metal Finisher
> Raw Material Handler
> Assembler A
> Welder "A"
> Lead Paint Sprayer
> Floorperson Assembly
> Sr. Receiving/Acceptance Inspector
>
> *Class 6—Other Occupations, Various Skills—Labor Grade 6*
>
> Set-Up Person "B"
> Senior Stock/Shipping Clerk
> Set-Up, Impregnate, Core Building Assembly and Machining
> Winding Department Equipment Set-up
>
> *Class 7—Other Occupations, Various Skills—Labor Grade 7*
>
> Set-Up Person "A"
> Tool and Die Maker "B"
> Maintenance Mechanic
>
> *Class 8—Other Occupations, Various Skills—Labor Grade 8*
>
> Master Set-Up
>
> *Class 9—Other Occupations, Various Skills—Labor Grade 9*
>
> Tool and Die Maker "A"
> Electrician (Maintenance)
> Automatic Screw and Bar
> Senior Maintenance
> Mechanic
> Machine Set-Up
> Senior Set-Up"

The matrix as implemented had nine different matrixes. However, at the end of negotiations on September 17, 2002, the Respondent had only advised the Union of five job classifications, i.e., assembler, assembly leadperson, machine operator, machine leadperson, and manufacturing cell. Both the Union and Respondent were aware that this was not the complete list of job classifications or matrixes.

After Respondent declared impasse it unilaterally established four new job classifications, i.e., quality skill matrix, material skill matrix, maintenance skill matrix, and miscellaneous skill matrix. These four matrixes or job classifications were never discussed during negotiations. Within each matrix was a list of the functions a person in that classification was required to perform. Within each matrix a person would be rated as trainee, proficient, or expert with higher pay as an employee went from trainee to proficient to expert. Expert signifying that you could train others.

The materials on the matrix given to the Union during negotiations were contained in General Counsel Exhibit 14. As noted above the material was incomplete and four new matrixes were added to the five discussed during negotiations.

Respondent issued General Counsel Exhibit 16 entitled "Users Manual." It was dated November 2002, and the record is not clear as to whether the Union received it in November 2002 or in January 2003. But be that as it may the Union's chief negotiator, Ed Oakley, made a comparison between the matrix material furnished to the Union during negotiations and the contents of the users manual which addressed the matrix and credibly testified that he found no less than 29 differences between what the Union was told about the matrix during negotiations and what was finally implemented. (GC Exh. 28.)

Before lawful impasse can be reached it is obvious that the parties should know what they are negotiating about. You can't intelligently reject a proposal without knowing what it is that you are rejecting. The burden of demonstrating the existence of impasse rests on the party claiming impasse. *Roman Iron Works*, 282 NLRB 725, 731 (1978).

The duty to bargain does not require a party to engage in fruitless marathon discussions at the expense of frank statement and support of one's position. Where there are irreconcilable differences in the parties' positions after full good-faith negotiations, the law recognizes the existence of an impasse. Some difficulty exists in establishing the inherently vague and fluid standard applicable to an impasse reached by hard and steadfast bargaining, as distinguished from one resulting from an unlawful refusal to bargain. It may be that in collective bargaining part of the difficulty arises from the fact that the law recognizes the possibility of the parties reaching an impasse.

The existence or nonexistence of an impasse is normally put in issue when, after negotiations have been carried on for a period of time, the positions of the parties become fairly fixed and talks reach the point of stalemate. When this occurs, the employer is free to make unilateral changes in working conditions (i.e., wages, hours, etc.) consistent with its offers that the union has rejected. *NLRB v. Katz*, 769 U.S. 736 (1962). In the instant case, the Union could not have rejected the matrix because it was incomplete. By the very nature of the bargaining process, it is not always apparent when an impasse has been reached. In general, before an employer may lawfully make unilateral changes, however, an impasse must exist.

In *A.M.F. Bowling Co.,* 314 NLRB 969 (1994), the Board summarized its test for impasse by saying: "The Board has defined impasse as the point in time of negotiations when the parties are warranted in assuming that further bargaining would be futile . . . . Both parties must believe that they are at the end of their rope." Id. at 978. In *Taft Broadcasting Co.,* 163 NLRB 475 (1967), the Board stated that impasse occurs "after good faith negotiations have exhausted the prospects of concluding an agreement" and enumerated some of the considerations in making such a determination:

> Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed.

The Board may also consider additional factors, for the existence of an impasse is very much a question of fact. These may include:

> 1. Whether there has been a strike or the union has consulted the employees about one. However, a strike does not necessarily create an impasse and may even break a preexisting one.
> 2. Fluidity of position.
> 3. Continuation of bargaining.
> 4. Statements or understandings of the parties concerning impasse.
> 5. Union animus evidenced by prior or concurrent events.
> 6. The nature and importance of issues and the extent of difference or opposition.
> 7. Bargaining history.
> 8. Demonstrated willingness to consider the issue further.
> 9. Duration of hiatus between bargaining meetings.
> 10. Number and duration of bargaining sessions.
> 11. Other actions inconsistent with impasse.

Impasse on one, or several, issues does not suspend the obligation to bargain on remaining, unsettled issues. Nor does the existence of a general impasse insulate a party from the duty to bargain, since an impasse normally only suspends the duty to bargain and changed circumstances may end the suspension.

An impasse can end suddenly; almost any changed condition or circumstance that renews the possibility of fruitful discussion will terminate the impasse. Thus, a party's willingness to change its previous position can end the impasse. However, one party cannot condition further bargaining on the other's willingness to modify its position unless there is a valid impasse. After Respondent ended negotiations on September 17, 2002, the Union presented the Respondent's final contract offer to the membership at a meeting the Union's leadership held with the unit employees. The unit employees voted overwhelmingly 68 to 7 to reject the Respondent's last offer. The unit employees also accepted the recommendation of Chief Negotiator Ed Oakley that the employees not go on strike but rather go to work and the Union would see what it could do.

On September 25, 2002, Ed Oakley sent a letter to Respondent, wanting to bargain further over the "Company's far reaching proposals" and in January 2003 the Union again requested further bargaining and specifically cited the incompleteness of Respondent's matrix proposal.

The General Counsel and Charging Party argue that no lawful impasse could be reached where the Respondent's proposal is incomplete or as counsel for the Charging Party called it during the hearing the proposal is still "a work in progress" or as the Board in *I.T.T. Rayonier, Inc.,* 305 NLRB 445 (1991), said regarding an offer on a yet to be formulated incentive pay plan put forward by Respondent that Respondent needed to put "meat on the bone."

Accordingly, I find the Respondent violated Section 8(a)(1) and (5) of the Act when it prematurely declared impasse and began implementing its last best offer to the Union. Since the Union did not have a complete proposal on the Matrix lawful impasse could not be declared by Respondent. *I.T.T. Rayonier, Inc.,* supra; *Outboard Marine Corp.,* 307 NLRB 1333 (1992).

Dave Horne, a former union officer and current employee of Respondent, testified that on September 17, 2002, Ed Oakley said after the last negotiating session that the parties were at "impasse." Oakley concedes he may have said this but meant that it looked like the Union couldn't get an agreement and not that the parties were at lawful impasse.

### *C. Unilateral Implementation*

Since a lawful impasse had not been reached Respondent violated Section 8(a)(1) and (5) of the Act when it thereafter

unilaterally implemented changes to the terms and conditions of employment of its employees generally consistent with its last best offer to the Union at the negotiating table with the exception of the matrix which was added to subsequent to the end of the negotiations.

On October 22, 2002, Respondent admitted it issued a booklet to unit employees entitled "wages, hours, and working conditions—new policies and changes." The booklet, General Counsel Exhibit 18, included the following changes in wages, hours, and working conditions from the 1999–2002 contract:

1. elimination of cost of living adjustment (COLA), p. 3.
2. reassignment of Unit work to non-bargaining unit personnel assigned to Development Cells, p. 2.
3. discontinuance of Respondent's contributions to the negotiated defined benefit pension plan, p. 4.
4. reduction of Respondent provided health plan benefits and the increasing of the cost of these benefits to employees, p. 5.
5. mandating of employee participation in Respondent's disciplinary investigations, p. 6.
6. limitation of arbitrators' authority to reverse certain discipline and termination cases, p. 6.
7. reduction and/or elimination of vacation benefits, pp. 7–12.
8. assertion of the right to alter work schedules on the second and third shifts with majority approval of employees, but without negotiating the change with the Union, p. 12.
9. requiring employees to schedule doctor appointments as late in the day as possible in order to receive pay for time lost, while obtaining treatment for work related injuries, p. 13.
10. changing of seniority provisions, pp. 14–17.
11. providing that past practices shall not be binding, p. 18.
12. establishment of a discharge penalty for an employee's failing to adequately document absences and tardiness, p. 18.
13. requiring that the Union submit grievances only on forms approved by Respondent, p. 19.
14. retaining of employee discipline records beyond one year, p. 19.
15. expansion of Respondent's ability to assign Unit work to non-unit personnel, p. 21.
16. restriction of employees' rights to make or receive emergency telephone calls, p. 22.
17. elimination of language authorizing the Union president (or designee) to receive telephone calls pertaining to Union business during working hours, p. 22.
18. expansion of Respondent's right to subcontract Unit work, p. 23.
19. changing of temporary employees' time credit toward fulfillment of probationary period, p. 24.
20. allowing of Respondent to use employees from temporary employment agencies in certain instances to perform Unit work, p. 24.
21. modification of language providing for the collection of Union dues or financial core obligations from non-members of the Union, p. 25.
22. provision that Respondent may switch to bi-weekly payroll, p. 25.
23. prohibition of sympathy strikes for certain companies owned or related to Respondent, p. 26.
24. requiring that the union obtain written permission from Respondent prior to soliciting funds in the plant during working hours, p. 27.
25. prohibition of employees from conducting Union business in the plant during working hours, p. 30.
26. limiting to two the number of Union representatives who may be absent on Union business, and defining what constitutes Union business, p. 30.
27. limiting to four the number of Union representatives who may attend negotiations, p. 30.
28. limiting to three the number of Union representatives who may attend Union conventions (for up to five consecutive working days), p. 30.
29. increase in the amount of notice required for Union leave, p. 30.
30. changes in Unit employees' job classifications, job titles, job duties, job qualifications, and rates of pay, p. 32.

The 30 changes listed above were admitted to by Respondent. If a lawful impasse had been declared by Respondent the implementation of these changes to the terms and conditions of employment would be lawful. However, no lawful impasse was reached. Therefore, Respondent violated Section 8(a)(1) and (5) of the Act when it unilaterally implemented the above changes. See *NLRB v. Katz*, 369 U.S 736 (1962).

In addition Respondent violated the Act in implementing the matrix over the 3-month period after Respondent unlawfully declared impasse. I credit the testimony of employee and Union President Michael Jackson that "discussions" or "meetings" on the matrix between Respondent and the Union after negotiations ended on September 17, 2002, were Respondent telling the Union what Respondent had decided to do on the matrix and nothing more.

### *D. Information Requests*

It is well-settled law that if the Respondent refuses to turn over to the Union which represents a unit of its employee information which the Union requests that is relevant and neces-

sary to the Union in carrying out its collective-bargaining responsibilities then the Respondent has violated Section 8(a)(1) and (5) of the Act by not bargaining in good faith. *NLRB v. Acme Industrial Co.,* 385 U.S. 432 (1967), *NLRB v. Truitt Mfg. Co.,* 351 U.S. 149 (1956). Information regarding employees represented by the Union, e.g., wages and benefits, is presumptively relevant and necessary to the Union in carrying out its collective-bargaining obligations.

It is alleged that Respondent violated the Act by not complying with certain information requests made by the Union.

The Union about October 24, 2002, requested and Respondent failed and refused to furnish the Union with its final contract proposal in writing. The Union received Respondent's proposals during negotiations but they were in a less than a totally organized order. The Union orally repeated this request in a meeting with Respondent's chief negotiator, Peter Kraft, on January 28, 2003. Respondent had this information, should have turned it over, and in failing and refusing to do so violated Section 8(a)(1) and (5) of the Act.

Respondent replaced the union pension from with the 401(k) plan that was available to its nonunion employees after unlawfully declaring impasse. The Union in September 2002 requested a copy of the summary plan documents describing the 401(k) plan. Respondent did not turn over these documents and therefore violated Section 8(a)(1) and (5) of the Act since this information was clearly relevant and necessary for the Union carrying out its collective-bargaining responsibilities.

On or about February 28, 2003, the Union, in writing, requested from Respondent information concerning health insurance coverage and changes in insurance rates. Again, this information is clearly relevant and necessary to the Union in carrying out its collective-bargaining responsibilities and the failure of Respondent to produce it violated Section 8(a)(1) and (5) of the Act.

It is alleged that Respondent's chief negotiator, Peter Kraft, violated the Act when on January 29, 2003, it notified the Union in writing that future information requests should be made to him, in writing, and should state the reasons why the request is being made. I do not find this to be a violation of the Act since as a practical matter it is easier to know what the Union is requesting if it is in writing and invariably the Union can easily provide the reason or reasons for its requests. Putting in writing what you want and why you need it doesn't appear to be overly burdensome.

### *E. September 2002 Layoffs and Downgrades*

During negotiations the parties knew that a layoff was coming up. The parties knew Respondent was having financial problems and there had been several layoffs in the recent past. More specifically 25 employees were laid off in October 2001 and another 15 employees in January 2002. Hopefully, the hearing testimony of Brenda Leamy, Respondent's director of human resources, that Respondent's fortunes are getting better continues to be true and further layoffs are not necessary.

In any event this layoff on September 23, 2002, of 17 unit employees was done in the same manner as previous layoffs were done. Further, Respondent granted the Union's request at the end of negotiations that the seniority clause under the expired contract apply to the layoffs rather than Respondent's proposed change to seniority, which the Union opposed. Respondent did what the Union requested, i.e., used the old seniority system of departmentwide rather than plantwide seniority.

The layoff triggered a downgrade of some 12 other unit employees on September 25, 2002, essentially because they no longer were doing setup work for the employees laid off. Respondent convinced me that the layoff and resulting down grades were done consistent with past practice. Later on December 18, 2002, the Union protested the downgrade and the parties agreed to meet over it.

I find that the layoffs and downgrades by Respondent on September 23 and 25, 2002, respectively, did not violate the Act.

### *F. Miscellaneous Allegations*

It is alleged that Respondent unlawfully reduced the toolroom attendant position from full time to part time in September 2002, and in or about February 2003 eliminated the position all together.

Cindy French worked as a toolroom attendant. She was away from work and employees started drawing their own tools. When French returned to work she was reassigned to the stockroom and remained a full-time employee. I find no violation of the Act.

It is alleged that Respondent on October 23, 2002, unlawfully eliminated the practice of allowing union offices and stewards to take time off from scheduled work to attend union business meetings. Respondent was busy at the end of the month and asked the employees affected to change the date of the union business meeting. They did not do so and Respondent didn't give them time off because they were needed at work. I find no violation of the Act because of what happened on October 23, 2002, but Respondent did unlawfully and unilaterally make changes regarding union business by employees when it issued the booklet referred to in section III,C, above.

It is alleged that Respondent about October 24, 2002 recalled two employees, Linda Doane and Nancy Kane, from layoff and downgraded their jobs to PM stepper cell, labor grade 2 when they had been labor grade 4. This was consistent with past practice and I find no violation of the Act.

It is alleged that Respondent unlawfully failed to recall employee Jennie Smith on December 9, 2002, to the proper position of maintenance assistant and instead posted an opening for that position. Respondent in early 2003 recalled Jennie Smith back to work and claims the job Smith was laid off from was a janitor position and no requirement to recall her to the maintenance assistant position, which was a new position under the matrix. I find no violation of the Act.

It is alleged that Respondent unlawfully posted openings for the position of quality assistant A in receiving. This was a new matrix position. Respondent was without authority to post this or any other matrix position because it prematurely claimed impasse in the negotiations. Matters should be returned to the status quo ante if so requested by the Union.

It is alleged that Respondent unlawfully assigned the unit work of producing gears and winding stepper motors to non-

unit employee Cindy Chapman in January 2003. This is a violation of Section 8(a)(1) and (5) of the Act because Respondent should negotiate with the Union about nonunit employee Chapman doing unit work and it did not.

It is alleged that Respondent violated the Act when about February 10, 2003, it placed employee Marie Hay into a trainee position and paid her a lower wage rate than she was entitled to receive. This is a violation of the Act because the trainee status in which Respondent placed Marie Hay was a new matrix position and Respondent was without authority to implement the matrix because of its premature invocation of impasse.

It is alleged that Respondent in February 2003 unlawfully subcontracted circuit board production work to an outside contractor. Under the expired collective-bargaining agreement Respondent could subcontract work but not if it did so with intent to eliminate bargaining unit positions. I credit Respondent's then president, Dominic More, that the work was subcontracted out for legitimate business reasons, i.e., the outside contractor could do the work much cheaper than Respondent could and Respondent subcontracted the work for this reason so it could keep the customer and did not subcontract out the work to eliminate jobs at Respondent. The employees affected by the subcontracting out were reassigned and continued as employees. Accordingly, I find no violation of the Act.

It is alleged that Respondent unlawfully transferred employee Melissa Thornton to a position and paid her at a lower rate than she was entitled to receive. This was a matrix position and Thornton wasn't qualified for the higher rate of pay. Since the Matrix was unlawfully implemented matters should be restored to the status quo ante if the Union so requests.

It is alleged that Respondent in March 2003 unlawfully subcontracted the unit work of screw machine and hand lathe operation to an outside contractor. I find this was done for legitimate economic reasons and not to eliminate unit work and was not a violation of the Act.

It is alleged that Respondent in May 2003 posted a job in the PM stepper cell at labor grade 3, rather than labor grade 4, and paid a new employee at a lower wage rate than the position was supposed to received. I find no violation of the Act because Respondent didn't lower any employee's wage rate but added a new job in the PM stepper cell to be paid at labor grade 3.

It is alleged that Respondent in June 2003 assigned the unit work on the Hobbing machine to Cindy Chapman, a nonunit employee. The Union had requested that a unit employee named Claire do this job. However, Claire didn't have the skill to do the job and didn't want to do it. I find no violation of the Act.

It is alleged that Respondent posted and paid new employees on the FPL (focused product line) at labor grade 3 rather than labor grade 4. Respondent did so in order to qualify new employees to get the job on the FPL (focused product line) since it is easier to qualify for a labor grade 3 position, get the job, and progress to labor grade 4 than to qualify to start at labor grade 4 I find no violation of the Act.

It is alleged that Respondent in February 2003 placed employee and Union President Michael Jackson in the position of material handler and paid him at a lower wage rate, i.e., the wage rate of a trainee rather than at the higher wage rate of proficient or expert.

Respondent paid Jackson at the lower rate to begin with because of his lack of knowledge of warehouse operations. At the time of the hearing before me he was being paid at a higher rate of pay.

This was done pursuant to the matrix, which was unlawfully implemented by Respondent, and matters should be restored to the status quo ante if the Union wants.

### *G. Withdrawal of Recognition*

On June 16, 2003, Respondent by letter withdrew its recognition of the Union as the exclusive collective-bargaining representative of the unit.

At the time of contract renewal negotiations in September 2002 the unit had approximately 83 unit employees. After the September 2002 layoff the complement of unit employees was reduced to approximately 67. At the time Respondent withdrew recognition there were 66 unit employees. Respondent withdrew recognition based on a petition signed by 36 unit employees saying they no longer wanted to be represented by the Union. This is a majority of the employees but a razor thin majority.

I find that the unfair labor practices committed by Respondent tainted the decertification petition and Respondent could not rely on the petition in withdrawing recognition from the Union. See *Heritage Container, Inc.,* 334 NLRB 455 (2001); *Mastronardi Mason Materials Co.,* 336 NLRB 1296 (2001); and *Penn Tank Lines, Inc.,* 336 NLRB 1066 (2001).

Further I find that even in the absence of the earlier unremedied unfair labor practices that Respondent's assistance in drafting the petition and the language of the petition render the petition one that Respondent could not in good faith rely upon in withdrawing recognition. An employer can render ministerial aid in assisting employees with a decertification petition and still rely on the petition but Respondent went beyond ministerial aid.

I find that employee support of the Union was undercut by Respondent's unfair labor practices. Before negotiations for a new contract began on September 5, 2002, the Union conducted a strike vote to see if the employees were willing to go on strike. The vote was an overwhelming 49 to 0 in favor of going on strike. After negotiations ended the employees voted 68 to 7 to accept the Union's recommendation and reject Respondent's final contract offer.

Prior to negotiations beginning in early September only four employees sought to become financial core members of the Union, Arthur White, William Field, David Breunig, and Robin Dupuis, and all but Dupuis told Union President Mike Jackson that they were doing so because of increased dues occasioned by the merger of the IUE and the CWA. Full members pay more dues than financial core members.

Further in the spring of 2002, some months before negotiations began in September 2002, Respondent permitted a petition to be posted on the bulletin board soliciting employee interest in doing away with the union-security clause requiring employees to be full members or financial core members of the

Union, i.e., a so-called deauthorization petition. It attracted little or no interest among the employees.

Lastly after September 17, 2002, when Respondent unlawfully declared impasse Respondent no longer collected union dues through dues checkoff and the uncontradicted testimony of Oakley and Jackson is that the employees paid their dues.

Accordingly, there was strong support for the Union prior to Respondent's unfair labor practices, which remained unremedied and which began in late September 2002 and continued for many months.

Respondent unlawfully declared impasse and unlawfully and unilaterally implemented numerous changes to the terms and conditions of employment of its employees and failed to produce to the Union relevant and necessary information the Union requested. This could not help but undercut support for the Union.

In late May 2003, employees Cathy Vachon and Kim Libby asked Brenda Leamy, Respondent's director of human resources, for help in getting rid of the Union. Leamy consulted with Attorney Peter Kraft who said to tell the women to call the NLRB Regional Office in Boston and Leamy did just that. So far so good. That was rendering ministerial aid and perfectly lawful.

Vachon and Patty Fraser, another employee, sometime later asked Leamy for help in wording a petition seeking to decertify the union. They told Leamy why they wanted to get rid of the Union. Leamy contacted Kraft who based on what Leamy told him about why Vachon and Fraser wanted to get rid of the Union drafted a petition for the signature of employees seeking to decertify the Union. The wording of the petition was as follows:

*Petition*

1. The undersigned employees of EADmotors are unhappy with our Union representation. We feel this way for several reasons:
2. They Union representatives do not seem to always tell us the truth about what is happening. They are patronizing us with partial facts, making themselves sound better than they are, and making the Company sound worse than it is. We're tired of not getting the real story. The Union's trash talk can't be doing us any good with the owners either.
3. Some of the Local officials have been representing themselves and what they want without thinking about the rest of us. They are not supposed to be motivated by self interest, but instead by all the employees' interests as a group.
4. The Union is causing too many fights, forcing the Company to spend a lot of money on lawyers. Our business is hurting. We don't want the owners to get so frustrated with the Union that the owner decides to leave Dover, New Hampshire and move everything to Arkansas.
5. The employees are more comfortable and have a greater trust of the leaders who now run the Dover plant (Dom More, Brenda Leamy) compared to the old leadership (Lee Perlman, Lavana Snyder). After the leaders changed, the Union hasn't really been needed so much anymore.
6. For these reasons (and other reasons as well), each employee signing below no longer wants the Union to represent him or her."
7. When Leamy showed Fraser and Vachon the petition the women said delete the fourth reason. Leamy did so and the petition actually circulated among the employees read as follows:

*PETITION*

This undersigned employees of EADmotors are unhappy with our Union representation. We feel this way for several reasons:

1. The Union representatives do not seem to always tell us the truth about what is happening. They are patronizing us with partial facts, making themselves sound better than they are, and making the Company sound worse than it is. We're tired of not getting the real story. The Union's trash talk can't be doing us any good with the owners either.
2. Some of the Local officials have been representing themselves and what they want without thinking about the rest of us. They are not supposed to be motivated by self interest, but instead by all the employees' interests as a group.
3. The Union is causing too many fights, forcing the Company to spend a lot of money on lawyers. Our business is hurting. We don't want the owner to get so frustrated with the Union that the owner decides to leave Dover, New Hampshire and move everything to Arkansas.

For these reasons (and other reasons as well), each employee signing below no longer wants the Union to represent him or her."

Respondent's owner, Logan Delaney, who did not testify before me, owns another business in the State of Arkansas, which also produces motors.

On June 4, 2003, Fraser and Vachon went to Leamy's office with the petition, signed by a majority of the unit employees, i.e., 35 employees.

There were two copies of the petition one signed and circulated by Cathy Vachon and one signed and circulated by Patty Fraser. A total 35 employees signed the two petitions.

Vachon credibly testified that she signed the petition she circulated and saw 11 other employees whom she named sign it as well and testified that employee Robert Welch got 6 employees to sign the petition and employee Dale Zopf got 3 employees to sign it. In all the petition circulated contained the signatures of 21 employees.

Fraser credibly testified she signed the petition she circulated and saw 10 employees whom she named sign it. The petition Fraser circulated also contained the signatures of an additional three employees for a total of 14 signatures. A 15th employee, Donald Gosselin, signed the petition on June 13, 2004, for a total of 36 employees signing both copies of the petition.

Respondent introduced into evidence W-4s for the employees whose signatures appear on the two petitions as well other documents from employee personnel files containing signatures of employees, i.e., I-9 immigration forms and health care beneficiary forms. A comparison by me between the signatures on the petition and the documents submitted from employee personnel files coupled with the testimony of Vachon and Fraser lead me to conclude that the signatures on the two copies of the petition were put on the petition by the employees.

I find that a majority of employees did sign the petition.

Leamy informed Attorney Peter Kraft that she had received the petition and on Tuesday, June 10, 2003, Kraft held a meeting with employees. Kraft read the petition verbatim and told employees they had until Friday, June 13, 2003, to take his or her name off the petition if he or she so decided. No one took his or her name off the petition and one additional employee Donald Gosselin actually signed the petition. On Monday, June 16, 2003, Kraft sent a letter to the Union advising it that Respondent was withdrawing recognition.

Kraft conceded that with respect to paragraph 1 or the first stated reason for decertification that it was he and not Vachon or Fraser who selected the words "patronizing" and "trash talk."

The part of the petition, of course, that leaps out at anyone experienced in labor law and would chill the spine of any employee who saw a similar reason listed for getting rid of the Union where he or she worked is paragraph 3 or the third stated reason, i.e.,

> The Union is causing too many fights, forcing the Company to spend a lot of money on lawyers. Our business is hurting. *We don't want the owner to get so frustrated with the Union that the owner decides to leave Dover, New Hampshire and move everything to Arkansas*. [Emphasis added.]

As noted above, Owner Logan Delaney owns another business, which also manufactures electric motors and is located in the State of Arkansas.

At the meeting on June 10, 2003, neither Kraft nor anyone else on behalf of management told the employees that Respondent would *not* move to Arkansas if the employees did not decertify the Union. When Kraft read verbatim the reasons listed in the petition, without editorial comment, the employees could only conclude that Respondent *might* relocate from New Hampshire to Arkansas if the employees continued to support the Union. Kraft put Respondent's stamp of approval on the reasons stated in the petition.

Needless to say a threat to relocate a plant to defeat a union is a hallmark violation of the Act.

I find that the petition was tainted by Respondent's earlier and unremedied unfair labor practices and could not be relied on to justify withdrawal of recognition from the Union. Further, even if there were no prior and unremedied unfair labor practices that the petition could not be relied on to justify withdrawal of recognition because it contained a threat of plant relocation which Respondent put its stamp of approval on by typing the petition and more significantly by not disavowing the threat of relocation at the meeting with employees on June 10, 2003.

I find Respondent violated Section 8(a)(1) and (5) of the Act when it withdrew recognition from the Union on June 16, 2003.

*H. The "Have Your Say" Committee*

According to Brenda Leamy, the genesis of the "Have Your Say" committee came on July 30 or 31, 2003, at a monthly "Chat with the President" meeting. An employee asked why all hourly employees didn't all have the same benefits (unit and nonunit) now that there was no union at Respondent. According to Leamy, Dave Horne suggested a committee to try and establish consistent policies. However, minutes of the meeting show that the committee, and even its name, was suggested by Respondent President Dominic More.

On August 7, 2003, Respondent posted a notice on the employee bulletin board entitled: "Have Your Say—Volunteers Needed." It stated that:

> In order to be consistent in our employee policies, it is very obvious that changes have to be made. EAD is looking for people to become part of a committee to discuss these policies or issues and recommend one consistent policy for hourly employees. We would like YOU to tell us what you think needs to be changed and what is important to you."

The notice continued by stating that employees should let the human resources department know if they wanted to participate, that six members would be chosen, and that meetings would be held for about 1 hour per month. Ten employees volunteered and Respondent chose them all. On August 13, 2003, Respondent posted a notice advising employees of the names of the 10 employees whom it had chosen to be on the committee to deal with "recommendations on inconsistencies in policies for hourly employees at EAD." Employees were encouraged to see the members of the committee about concerns or recommendations, or to write recommendations on a form made available.

The committee meetings were held on working time, and employees were paid while attending them. The first meeting was held on August 20, 2003, during working time, in a conference room. The 10 members of the committee were divided between unit and nonunit employees. Brenda Leamy led the meetings and asked what issues were priorities to discuss. She testified that she told the committee what was expected of them and that their suggestions and recommendations would be considered. All objects pertaining to work were open for discussion. None of these subjects were off limits. Brenda Leamy asked committee members to find out what other employees wanted and "to feel the pulse of the people in the plant," and get a representative sample of what employees thought.

On August 20, 2003, Respondent posted a notice concerning the issues discussed at the committee meeting held that day. (GC Exh. 66.) They included: vacation policy, sick/personal/pa days, benefits, flextime, breaks and lunch, and make-up policy. The notice stated that the group decided to discuss vacations and sick/personal/pa days first. Respondent also posted "teams" that would discuss four of the subjects. Each team listed as a "monitor" either Leamy or Janice Zecher, a payroll office employee, and admitted supervisor. Leamy character-

ized herself and Zecher as team leaders; while they helped answer questions, they could act like any other member of the committee.

On September 4, 2003, Respondent posted a notice to employees listing recommended changes in the vacation policy pursuant to their discussions at the last committee meeting. (GC Exh. 67.) Based on the committee discussions, Respondent changed the vacation policy so it would be easier to use, and in January 2004, established new PTO (paid time off) and attendance bonus policies. (GC Exhs. 67 and 68.) These policies were clearly beneficial to unit employees. Leamy testified that she particularly helped with suggestions on the attendance bonus policy.

Leamy admitted at the hearing that she and President More decided what the structure of the committee would be, and that it would make recommendations, not policy. She acknowledged that the Union had previously discussed similar vacation policy changes with Respondent. Leamy admitted that the committee filled the void that was left since June, after Respondent ceased to recognize the Union.

The evidence presented at the hearing shows that Respondent established the committee at the suggestion of its president, Dominic More. The committee is run and maintained by Respondent, and was set up to deal with Respondent concerning wages, hours, and working conditions. It has discussed with Respondent changes in vacation policy, breaks, timeclocks, flextime, and other issues, and makes recommendations on vacation time and make-up time that became Respondent's policies. As Brenda Leamy admitted at the trial, the committee fills a void left by the absence of the Union after the withdrawal of recognition. The committee is a labor organization dominated and assisted by Respondent. *Electromation, Inc.,* 309 NLRB 990 (1992), enfd. 35 F.3d 1140 (7th Cir. 1994). By its actions in connections with the committee, Respondent has violated Section 8(a)(1) and (2) of the Act.

## REMEDY

The remedy in the case should include a cease-and-desist order, the posting of a notice, the restoration to the status quo ante, if requested by the Union, and this may result in the payment of backpay or health insurance refunds, and the Respondent should be ordered to once again recognize the Union and, on demand, bargain with it in good faith. Restoring matters to the status quo ante means, of course, Respondent reversing the unilaterally implemented changes to terms and conditions of employment it implemented following its premature declaration of impasse.

## CONCLUSIONS OF LAW

1. The Respondent, EAD Motors, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, IUE–CWA, Local 81243, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) and (5) of the Act when it unlawfully declared impasse and unilaterally implemented changes to the terms and conditions of employment of its employees.

4. Respondent violated Section 8(a)(1) and (5) of the Act when it failed and refused to turn over to the Union information requested by the Union concerning a written copy of Respondent's final contract offer, a summary plan description of Respondent's 401(k) plan, and a copy of Respondent's health insurance plan, which information was relevant and necessary to the Union in carrying out its collective-bargaining responsibilities.

5. Respondent violated Section 8(a)(1) and (5) of the Act when it unlawfully withdrew recognition from the Union.

6. Respondent violated Section 8(a)(1) and (2) of the Act when it unlawfully assisted, dominated, and interfered with the "Have Your Say" committee, a labor organization within the meaning of Section 8(a)(5) of the Act.

7. The above violations of the Act are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]